

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARIA J. THORPE

v.

CONTINENTAL CASUALTY  
COMPANY

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CIVIL ACTION

NO. 01-5932

O'NEILL, J.

JANUARY , 2003

MEMORANDUM

On December 18, 2002, I issued an Order in which I found that defendant's denial of plaintiff's long-term disability benefit violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq. The Order required that defendant reinstate plaintiff to disabled status and pay her the benefits she would have received from the date her benefits were terminated until the date of the Order. I have before me plaintiff's motion for attorney's fees and costs of litigation and defendant's brief in opposition thereto.

BACKGROUND

The factual background of this case is set forth in the December 2002 decision, Thorpe v. Continental Casualty Co., 2002 U.S. Dist. LEXIS 24405 (E.D. Pa. Dec. 17, 2002). For purposes of this decision it is important to note that defendant terminated plaintiff's long-term disability benefits in a situation that I reviewed under a heightened arbitrary and capricious standard of review. The reasons that this standard applied and plaintiff deserved summary judgment were:

(1) defendant's reversal of its original decision to grant plaintiff long-term disability benefits; (2) defendant's selective reading of the administrative record and use of only those parts of the record that supported its decision to deny benefits; (3) defendant's failure to give the appropriate weight to the opinions of plaintiff's treating physicians; (4) defendant's use of a nurse who did not examine plaintiff to make the determination to terminate benefits; and (5) defendant's overemphasis on a cognitive functioning test that it administered to plaintiff.

### STANDARD OF REVIEW

ERISA authorizes me to grant plaintiff attorney's fees and costs. The statute provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). The Court of Appeals has established a five-factor analysis for whether a prevailing party in an ERISA suit should receive attorney's fees and costs. The five factors are:

- (1) the offending party's culpability or bad faith;
- (2) the ability of the offending party to satisfy an award of attorney's fees;
- (3) the deterrent effect of an award of attorney's fees against the offending party;
- (4) the benefit conferred on members of the insurance plan as a whole; and
- (5) the relative merits of the parties' positions.

Ursic v. Bethlehem Mines, 719 F.2d 670, 673 (3d Cir. 1983). There is no presumption that a plaintiff who succeeds on an ERISA claim is entitled to an award of attorney's fees and costs of litigation. McPherson v. Employees' Pension Plan of Am. Re-Insurance Co., Inc., 33 F.3d 253, 254 (3d Cir. 1994). Rather the plaintiff must show exceptional circumstances warranting the

award. Id.

When attorney's fees are granted, they must be limited by the principle of reasonableness. The party seeking reimbursement of fees is responsible for proving that the request is reasonable. Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990). Plaintiff can recover for a reasonable hourly rate, according to the prevailing rate in the community, multiplied by the number of hours needed for work that is "useful and of a type ordinarily necessary to secure the final result obtained." Carney v. International Brotherhood of Electrical Workers Local Union 98 Pension Fund, 2002 U.S. Dist. LEXIS 15399 at \*4-5 (E.D. Pa. August 14, 2002)(citing Pa. v. Del. Valley Citizens' Council, 478 U.S. 546, 561 (1986)). No recovery may be had for hours of attorney work that is "excessive, redundant or otherwise unnecessary." Carney, 2002 U.S. Dist. LEXIS 15399 at \*5 (citing Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)).

## DISCUSSION

### **I. Attorney's Fees and Costs of Litigation Should Be Awarded**

#### **A. Defendant's Culpability or Bad Faith**

The first factor favors an award of attorney's fees and costs against parties who acted in bad faith or whose conduct is culpable. McPherson, 33 F.3d at 256. Bad faith connotes action taken with an ulterior motive or sinister purpose. Id. Culpable conduct is "blameable" and "censurable." Id. . To be culpable, conduct must involve "something more than simple negligence" and be "reprehensible or wrong," however it need not involve "malice or a guilty purpose." Id. at 256-57.

The grant of summary judgment against defendant was based on its termination of

plaintiff's long-term disability benefits, against the explicit opinion of her two treating physicians. Thorpe, 2002 U.S. Dist. LEXIS 24405. Defendant's decision was based on the results of a cognitive function test and the opinion of a nurse who reviewed the file and whose only contact with plaintiff was over the phone. Id. Although this action violated ERISA, as I found in my December 17, 2002, judgment, defendant did not act in bad faith.

However, defendant's degree of fault in its treatment of plaintiff's claim was more than mere negligence; it was culpable. Defendant was wrong in failing to ensure that there was sufficient evidence of plaintiff's recovery to reverse its earlier decision that her condition justified her receipt of long-term disability benefits. It deliberately took a course of action that violated ERISA. This factor, therefore, favors an award of attorney's fees and costs.

**B. Defendant's Ability to Satisfy and Award of Attorney's Fees and Costs**

Defendant does not address this issue in its brief; however, it did argue in the summary judgment phase of this case that it was a financially sound company capable of paying plaintiff's benefits without difficulty. This factor weighs in favor of awarding plaintiff attorney's fees and costs.

**C. The Deterrent Effect of an Award of Attorney's Fees and Costs**

Defendant argues that it did not violate ERISA and, therefore, requiring it to pay plaintiff's attorney's fees and costs could not have a deterrent effect. Because I found that defendant did violate ERISA, however, there is conduct to be discouraged.

Defendant acted in an arbitrary and capricious manner in its treatment of plaintiff's claim.

Its action violated ERISA and similar treatment of claims should be discouraged. Therefore, this factors weighs in favor of awarding attorney's fees and costs.

**D. The Benefit Conferred on Members of the Insurance Plan as a Whole**

Plaintiff's suit resulted in her immediate benefit. It also should have an effect in how defendant operates the insurance plan as a whole. Defendant should be more thorough in its review of claims as a result of the judgment against it and, therefore, all members of the insurance plan may benefit from this law suit. This factor favors the award of attorney's fees and costs.

**E. The Relative Merits of the Parties' Positions**

Defendant acted arbitrarily and capriciously in terminating plaintiff's long-term disability benefits. Plaintiff used the administrative review procedures available at defendant company and, when the administrative appeals did not end in a favorable result, she came to this court. Defendant has now been ordered to reinstate plaintiff's benefits and pay her the benefits that she should have been paid earlier. Plaintiff has been given the benefits to which she is entitled, but is the facing financial difficulties brought on by her sudden loss of income, including the impending foreclosure on her home.

Plaintiff's claim clearly had merit. Defendant in an arbitrary and capricious manner in violation of ERISA. The relative merits of the parties' positions clearly favors plaintiff.

## **II. The Amount To Be Awarded**

Plaintiff bears the burden of establishing what attorney's fees and cost have been incurred and that those fees and costs are reasonable. Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990). In her motion for attorney's fees and costs, plaintiff submitted a print-out of her attorney's recorded hours of work on this case and costs incurred by the law firm. The hours report does designate which attorney did what work and the hourly rate for the junior attorney—\$100 per hour—and the senior attorney—\$300 per hour.

I need more evidence from plaintiff before I can make a finding that her claim for attorney's fees and costs is reasonable. There are three distinct ways in which the fees must be reasonable: (1) the nature of the work done; (2) the amount of time spent on the work done; and (3) the hourly rate charged for the work done. Plaintiff's evidence should address all three of these aspects of her fee request, which are all dependent on the complexity of the particular claim that was brought on behalf of plaintiff. Any time that is attributed to plaintiff's attorneys learning the basic law of ERISA is not compensable.

Some examples of evidence that would assist me in making this determination are affidavits by attorneys who do similar work, judicial reports on attorney's fees, surveys of fees charged for ERISA work in this legal market, and other district court opinions approving attorney's fees at a certain rate.

Defendant has made two objections to plaintiff's request for attorney's fees and costs. Defendant asks me to deny fees for time spent during the administrative appeal process and hours logged preparing two motions that I denied. I agree with defendant and will not allow plaintiff to recover fees or costs associated with those actions.

Once plaintiff has filed more evidence supporting her request for attorney's fees and costs, defendant should submit to me a detailed list of objections. Defendant should cite the particular hours or fees to which it objects and explain why it should not have to pay for those items.

An appropriate Order follows.

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**ORDER**

AND NOW, this            day of January, 2003, after consideration of plaintiff's motion for attorney's fees and costs of litigation and defendant's brief in opposition thereto, and for the reasons set forth in the accompanying memorandum, plaintiff's motion is GRANTED. It is ORDERED that:

- (1) plaintiff's counsel submit additional evidence supporting its claim for attorney's fees and costs within 10 business days from the date of this order; and
- (2) defendant submit a brief detailing its objections to plaintiff's request for attorney's fees and costs within 10 business days thereafter.

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THOMAS N. O'NEILL, JR., J.